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Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction: Establishment and Composition

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Summary

On February 6, 2004, President George W. Bush created the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction to advise and assist him in performing his presidential duties. This report analyzes the establishment and organizational requirements set forth in the presidential mandate, and its relationship to the Federal Advisory Committee Act (FACA). On March 31, 2005, the commission submitted its final report to the President, which contained 74 recommendations for reforming the U.S. intelligence community.

The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction was established by Executive Order 13328 of February 6, 2004.¹ Located within the Executive Office of the President for administrative and organizational purposes, the commission was largely governed by the requirements of the Federal Advisory Committee Act, unless otherwise indicated.²

FACA Requirements

FACA established the first requirements for the management and oversight of federal advisory committees to ensure impartial and relevant expertise. As required by FACA, the General Services Administration (GSA) administers and provides management guidelines for advisory committees. GSA also maintains an online database to make available detailed reports covering each committee's activities during the calendar year.³

¹ E.O. 13328, *Federal Register*, vol. 69, Feb. 11, 2004, pp. 6901-6903.

² 5 U.S.C. Appendix — Federal Advisory Committee Act; 86 Stat. 770, as amended.

³ The FACA database can be found at [<http://fido.gov/facadatabase>].

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Advisory committees can be designated as commissions, committees, councils, panels, or other similar groups. An advisory committee can be established by congressional legislation, by presidential executive order or directive, or by an agency head under general agency administrative authority. Excluded from the FACA definition is any commission composed entirely of full-time federal employees, or any committee established to perform primarily operational, as opposed to advisory, functions. In addition, Congress may choose to exempt an advisory committee from FACA's requirements.

FACA contains guidelines for membership in Section 5(b)(2), requiring that any advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed," and that the commission's recommendations not be inappropriately influenced by the appointing authority, or by any special interest.

Section 10(a) of FACA prescribes that each advisory committee meeting is presumptively open to the public, "except when the President determines otherwise for reasons of national security."⁴ FACA guidelines require that timely notice of each meeting open to the public be published in the *Federal Register*, and that detailed minutes of each meeting be taken. On May 13, 2004, it was announced in the *Federal Register* that the commission would meet in closed session on May 26 and May 27 in its offices in Arlington, VA.⁵

Pursuant to FACA, each commission must file a charter containing its mandate and duties, frequency of meetings, membership, and the agency to which the commission reports. Section 12(a) requires each agency to document fully the disposition of any funds that may be at the disposal of its advisory committees. With respect to advisory committees created by the President, financial records are to be maintained by GSA or by another agency designated in the authorizing presidential mandate. Each agency is also required to provide support services for each commission that it creates, or that reports to it, unless the establishing authority provides otherwise. Section 12(b) gives GSA the responsibility to provide appropriate support services for presidential advisory committees, unless the authorizing presidential mandate stipulates otherwise.

Commission Mandate

Oftentimes, one of the initial sections of a statute or executive order establishing a major advisory committee provides several statements identifying the conditions

⁴ Section 10(d) of FACA states that the President, or the head of the agency to which the advisory committee reports, may determine that a portion of a meeting be closed to the public, in accordance with 5 U.S.C. § 552(b), which identifies types of information that may be exempted from the rule of disclosure of the Freedom of Information Act. Any such determination should be written, and must state the reasons for closing the meeting. The advisory committee is also required to issue an annual report summarizing its activities, in accordance with 5 U.S.C. § 552(b).

⁵ Executive Office of the President, Office of Administration, "Meeting of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction," *Federal Register*, vol. 69, no. 93, May 13, 2004, p. 26602.

justifying the creation of a panel. Section 2(a) of E.O. 13328 stated that the commission was authorized to advise the President:

in the discharge of his constitutional authority under Article II of the Constitution to conduct foreign relations, protect national security, and command the Armed Forces of the United States, in order to ensure the most effective counterproliferation capabilities of the United States and response to the September 11, 2001, terrorist attacks and the ongoing threat of terrorist activity.

Section 6(b) states that the commission is established to “solely advise and assist the President” in performing his duties. Subject to the authority of the President, the commission is authorized to be independent “from any executive department or agency, or of any officer, employee, or agent thereof.”

A study commission’s objectives and the scope of its activities are best stated in specific terms to guide the panel’s members and staff in carrying out their responsibilities. Section 2(a) of E.O. 13328 states that the commission’s primary mandate is to assess whether or not the U.S. intelligence community⁶ is adequately prepared to identify and respond to “the development and transfer of knowledge, expertise, technologies, materials, and resources” associated with the threats and proliferation of weapons of mass destruction employed by foreign powers.⁷ So that the commission can better accomplish its mission, the presidential mandate prescribes the following duties in Section 2(b-d):

- examine and assess the U.S. intelligence community’s body of knowledge and intelligence-gathering capabilities prior to the initiation of Operation Iraqi Freedom;
 - compare this intelligence with the findings of the Iraq Survey Group, and other relevant agencies, concerning the capabilities, intentions, and activities of Iraq relating to the design and development, manufacture, acquisition, possession, proliferation, transfer, testing, potential or threatened use of weapons of mass destruction and related means of delivery;
 - evaluate the challenges and difficulties of obtaining these categories of information associated with weapons of mass destruction;
 - compare the U.S. intelligence community’s intelligence-gathering capabilities pertaining to weapons of mass destruction and other related threats in Libya, prior to that nation’s recent decision to open its programs to international scrutiny, with the current assessments of organizations examining these programs;
 - compare the U.S. intelligence community’s intelligence-gathering capabilities pertaining to weapons of mass destruction and other related threats in Afghanistan, prior to the removal of the Taliban government, with the current assessments of organizations examining these programs;
- and

⁶ Sec. 6(h) of E.O. 13328 defines “intelligence community” the same as 50 U.S.C. § 401a(4).

⁷ Sec. 2(a) of E.O. 13328 defines “foreign powers” to include terrorists, terrorist organizations and private networks, or other entities or individuals.

- prepare a final report based on its findings by March 31, 2005, with specific recommendations.

Membership Requirements

The membership requirements of FACA are broad enough to allow a great deal of discretion in determining the composition of a commission. Therefore, the membership of an advisory committee will depend upon its legislative or presidential mandate. FACA does not provide guidance on the number of members a commission or committee should have or their terms of appointment. The membership generally should be large enough to allow for representation of differing points of view and to facilitate a quorum for commission meetings. Advisory committees of short-term existence usually keep the same members for the committee's duration, with any vacancies filled in the same manner as the original appointments were made. Some advisory panels may have staggered membership terms so that only one portion of the members will be new at any given time, thereby ensuring continuity in the committee's operations. It is also possible for enabling legislation or a presidential mandate to specify how officers of an advisory panel are to be selected.

Section 3 of E.O. 13328 specifies that the commission was to be composed of no more than nine members, to be appointed by the President. Members were required to be U.S. citizens, and the President designated two co-chairpersons from the membership. Two-thirds of the commission members constituted a quorum. On February 6, 2004, President George W. Bush announced the appointment of seven members to the commission, including his appointment of two co-chairpersons. Two additional members were appointed on February 12, 2004. The membership was as follows:

- former Senator Charles S. Robb (co-chairperson);
- Laurence H. Silverman, retired judge (co-chairperson);
- Senator John McCain;
- Lloyd M. Cutler, former White House counsel;
- Patricia M. Wald, former federal judge;
- Richard C. Levin, President of Yale University;
- Retired Admiral William O. Studeman, former Deputy Director of Central Intelligence;
- Charles M. Vest, President of the Massachusetts Institute of Technology;
- and
- Henry S. Rowen, senior fellow at the Hoover Institution.

Member Compensation and Travel Expenses

Advisory panel members who are not federal employees may or may not receive compensation for their work on a commission. Section 6(f) of E.O. 13328 specifies that members of the commission shall serve without compensation for their work. Section 6(f) also authorizes travel expenses and *per diem* for commission members who are not officers or employees in the executive branch, as authorized by statute.⁸

⁸ 5 U.S.C. § 5701-5707.

Financial Disclosure Requirements

FACA guidelines do not contain financial disclosure requirements for members of an advisory committee. It appears from “federal law and regulation that one appointed to be a member of a federal advisory committee is required to file a financial disclosure form by virtue of his or her being either a regular federal employee or a ‘special government employee,’ as opposed to requiring a financial disclosure merely by virtue of his or her membership on an advisory committee.”⁹ Since the “fact of compensation is one of the determinate factors of whether one is or is not a federal employee,” an advisory committee member serving without compensation may not be required to file a financial disclosure form. If, however, “a person is appointed on an advisory committee, and is considered a ‘special government employee,’ then such person must file either a public or a confidential statement, depending on his or her compensation level and the amount of days in which he or she performs the duties of that position.”¹⁰ Even though the members of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction are serving without compensation, the White House announced on February 15, 2004, that they will file financial disclosure statements. The commission members’ statements will, however, remain confidential.¹¹

Commission Staffing and Administrative Support

Section 6(g) of E.O. 13328 specifies that the commission shall have an executive director and staff. The co-chairpersons are authorized to hire and employ staff, or obtain, by assignment or detail, federal agency personnel to head and staff the commission.

The co-chairpersons are authorized by Section 4 to convene and preside at commission meetings, determine the commission’s agenda, and assign work responsibilities, after consultation with other commission members. Administrative support is specified in Section 6(e) to be provided by the director of the Office of Administration within the Executive Office of the President.

Commission Funding

Commissions may be directly funded by Congress, or provided with monies indirectly through general agency appropriations. Although it happens rarely, an advisory committee may also receive funds from private sources. In the case of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Section 6(e) authorizes funding to be provided by the director of the Executive Office of the President’s Office of Administration, with the assistance of the director of the Office of Management and Budget, consistent with applicable law.

⁹ CRS Congressional Distribution Memorandum, *Advisory Committee Members and Financial Disclosure*, by Jack Maskell, Oct. 12, 1999, p. 1.

¹⁰ *Ibid.*, p. 3.

¹¹ Eric Lichtblau, “Panel’s Finance’s Will Stay Private,” *New York Times*, Feb. 15, 2004, p. 1.

Commission Reports

An advisory commission may be required to prepare an interim, or a final, report for transmittal to the President, to Congress, or other department heads. These reporting requirements usually can be found under the “duties” or “functions” sections of a panel’s statutory or presidential mandate, or in a special section that mandates the production of a final report.¹² The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction is required in Section 2(d) to make a final report to the President by March 31, 2005, based on its examination of the issues prescribed in Section 2(a-c). The commission’s report is authorized to include specific recommendations for ensuring that the U.S. intelligence community is sufficiently organized, equipped, trained, and funded to respond to the proliferation of weapons of mass destruction and other related terrorist threats. On March 31, 2005, the commission transmitted its final report to the President, which included 74 recommendations for improving the U.S. intelligence community. The report also provided a comprehensive review pertaining to its findings on weapons of mass destruction.

Since the recommendations contained in a final report are only advisory, no changes in public policy occur on the authority of a commission. Therefore, the implementation of these recommendations is left to determination by a specific statute, or presidential or agency directive, where appropriate. To ensure greater accountability for, and oversight of, a commission’s final report, it is often recommended that the statutory or presidential mandate include specific provisions to require follow-up or implementation of a commission’s final report. Section 2(d) of E.O. 13328 authorizes the CIA, as well as the other agencies and departments within the U.S. intelligence community, to utilize the work of the commission and its final report. Within 90 days of receiving the final report, the President is required to consult with Congress on the recommendations of the commission, and propose “any appropriate legislative recommendations” based on the commission’s findings.

Commission Termination

Unless statutorily mandated or otherwise extended by the President or agency head, an advisory committee will automatically terminate two years after its establishment. Consequently, most commissions must be rechartered with GSA every two years. The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction was required in Section 8 to terminate within 60 days after submitting its final report on March 31, 2005.

¹² U.S. Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, Mar. 31, 2005 (Washington: 2005), at [<http://www.whitehouse.gov>], visited on Mar. 31, 2005.